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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 78

BOSTON METALS COMPANY, FORMERLY NAMED BOSTON IRON AND METAL COMPANY, AS OWNER OF THE CANADIAN DESTROYER "ST. FRANCIS",

Petitioner,

VS.

S/S "WINDING GULF"

AND

MASSACHUSETTS TRUSTEES OF EASTERN GAS AND FUEL ASSOCIATES,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

JOHN H. SKEEN, JR.,
WILLIAM A. SKEEN,
EUGENE M. EINBLATT,
Proctors for Petitioners.

The Daily Record Co., Baltimore 3, Md.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the decision of the Court of Appeals for the Fourth Circuit affirming a decree of the District Court for the District of Maryland; and in support of its petition respectfully shows:

I.

QUESTION PRESENTED

When an inert tow, wholly under the direction and control of a towing vessel, is brought into collision with a third vessel through negligence of the master of the tug, may the owner of the tow be held directly liable in personam to the owner of the third vessel solely by reason of a contract between the owners of the tug and tow, (to which the owner of the third vessel was a stranger) providing that all towing is done at the sole risk of the tow, that the owner of the tow will indemnify the owner of the tug for damages to third vessels and containing a provision declaring the master of the tug to be the agent and servant of the owner of the tow?

The affirmative answer of the Fourth Circuit to this question necessarily involves the equally important underlying question of the validity of "pilotage clauses" and provisions in towing contracts stipulating against tug's negligence, as to which there is much uncertainty and conflict among lower federal courts. Petition for writ of certiorari to the Court of Appeals for the Fifth Circuit in a case presenting one significant aspect of this matter for determination is presently pending before this court.[1]

II.

JURISDICTION AND OPINIONS BELOW

Jurisdiction is based on 28 USC, Section 1254 (1).

The district court's opinion on liability is reported in 72 F. Supp. 50, and is reprinted at Record, pages 4-17. The

[1] *Bisso, Jr., Receiver, et al. v. Inland Waterways Corp.* (CA 5th), decided March 26, 1954, as yet unreported, affirming DC ED La., 114 F. Supp. 713, in which "modified pilotage" and "release towage" clauses were applied in a case of towage of a dumb barge.

district court's opinion on damages is reported in 85 F. Supp. 806, and is found at Record, pages 18-29. The opinion of the court of appeals is reported in 209 F. 2d 410 (adv.), and is found at Record, pages 41-48. The order denying rehearing is unreported and is found at Record, page 56.

III.

STATEMENT OF THE MATTER INVOLVED

This is a suit in admiralty instituted by petitioner against the steam Collier WINDING GULF, *in rem*, and her owners, *in personam*, to recover for loss of petitioner's vessel, Destroyer I-24, (otherwise known as the ST. FRANCIS) resulting from a collision with the WINDING GULF, which occurred while the I-24 was an inert tow, unmanned and without motive power, wholly under the direction and control of the tug PETER MORAN. Since jurisdiction could not be obtained over the tug or its owners in the District of Maryland, the tug was not before the court.[2] The WINDING GULF was damaged in the collision, and her owners filed a cross-libel *in personam* against petitioner.

The towage was being performed under a contract[3] which included the following clauses:

> "Tug services will be supplied upon the condition that all towing, moving, shifting, docking, undocking or other handling of a vessel or craft of any character by a tug or tugs owned or employed by the Tug Company is done at the sole risk of such vessel or craft and of the owners, charterers or operators thereof, and that the Master and crew of such tug or tugs used in the said services become the servants of and identified

[2] Owners of WINDING GULF sued the tug and owners in the Southern District of New York which resulted in a decision of both at fault and a decree dividing damages. *Adams v. The Peter Moran*, 94 F. Supp. 520. For Interlocutory Decree of Judge Coxe see Record, pages 38-39.

[3] Reprinted in full, Record, pages 1-3.

with such vessel or craft and their owners, and that the Tug Company only undertakes to provide motive power.

"The Tug Company will not be responsible for the acts or defaults of the Master, or crew of such tug or tugs, or any of their servants or agents or else whosoever, nor for any damages, injuries, losses or delays from whatsoever cause arising that may occur either to such vessel or craft, or property or persons on board thereof, or to any other ship or vessel or property of any kind whether fixed or movable and the Company shall be held harmless and indemnified by the Hirer against all such damages, injuries, losses and delays, and against all claims in respect thereof.

"Such exemption from liability shall apply regardless of whether such vessel or craft assists in the services with its own steam or power or in any other way, and irrespective of whether any employee of the Tug Company or the Master, or any of the crew of such tug or tugs is at the time of said services on board of such vessel or craft, or in command thereof.

"The foregoing conditions shall apply to any damages, injuries or loss from whatsoever cause arising that may occur to the vessel or craft requiring the tug or tugs or to any other vessel or craft, or to any person or property on board thereof, or to any other property whether fixed or movable, while such tug or tugs is or are in attendance upon or fast to or engaged in any maneuver for the purpose of making fast to, or disengaging from or proceeding clear from the vessel or craft requiring the tug or tugs, provided however that the said conditions shall not apply to loss or damage to the tug or tugs or to property on board the tug or tugs or to damages for personal injuries to or loss of life of members of the crews of the tug or tugs or persons on board thereof, unless such loss or damage or such damages for personal injuries or loss of life shall have been caused or contributed to by the fault or negligence of the vessel or craft requiring the tug or tugs."

The district court found that the collision was the result of negligence of both the WINDING GULF and the master of the tug and, by imputing the fault of the master of the tug to the owner of the tow, held petitioner liable on the cross-libel and entered decree dividing damages. The court held that the master of the tug "by the terms of the contract became" the servant of the owners of the tow, that the provisions of the contract thus legally resulted in making his faults directly attributable to the owner of the tow, and that "these faults may be ascertained in this case without the circuity of action due to their first being litigated in a suit by the WINDING GULF against the tug."[4]

In affirming, the court of appeals, without commenting on the district court's reasoning that the contract made the tugmaster petitioner's servant, seems to give conclusive effect to the contract as an indemnity agreement. Although the district court had assumed that "no question of indemnity arising under the contract" could be litigated in the case,[5] the court of appeals, after noting that "such a contract of indemnity (was) not unusual" and that such a contract had been "enforced" in a suit against the owner of a tow by the owner of a tug which had been compelled to pay damages to an injured third party,[6] said it saw "no reason why it should not be given effect in a suit by an injured third party against the owner of the tow. . . ."[7]

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[4] Record, page 16.
[5] Record, page 16.
[6] Referring solely to *Moran Towing and Transportation Company v. Navigazione Libera Triestine, S.A.*, 92 F. 2d 37, 1937 A.M.C. 981.
[7] Record, page 47.

IV.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

Upon the basis of a misapplication of this court's decision in *Sun Oil Company v. Dalzell Towing Company*, 287 US 291, the Fourth Circuit permitted direct recovery by a stranger to the towing contract against the owner of an inert tow who had committed no act of negligence against the stranger but to the contrary had suffered the total loss of his own vessel through the joint negligence of the stranger and the tug. In so doing, the Fourth Circuit has extended the scope of the *Sun Oil Company* decision far beyond what was intended by this court to establish an entirely new concept of delictual responsibility, unsettling the law as to liabilities *in personam* to third parties of owners of vessels in tow, and contributing substantially to "the quandary in which the marine industry finds itself"[8] as to the validity and effect of towage contracts.

This court considered the liabilities of towed vessels to third persons in *Sturgis v. Boyer*, 24 Howard 110, and there held that an inert tow wholly under the direction and control of a towing vessel, when brought into collision with a third vessel "is no more responsible for the consequences . . . than so much freight," and that third persons suffering damage must look to the tug.[9] See also *The Eugene F. Moran*, 212 U.S. 466, and *Liverpool B. & R. P. Steam Navigation Company v. Brooklyn Terminals*, 251 U.S. 48. The Fourth Circuit's conclusion that the contract was valid and effective to change the rule of *Sturgis v. Boyer*, (which concededly would have required dismissal of the cross-libel) is in con-

[8] *Bisso, Jr., Receiver, et al. v. Inland Waterways Corp.*, (DC ED La. 1953), 114 F. Supp. 713, 714.

[9] 24 Howard 110, 122.

flict with the decisions of this court in *The Steamer Syracuse*, 79 U.S. 167, and *Compania de Navegacion Interior v. Firemen's Fund Insurance Co.*, (The WASH GRAY) (1928) 277 U.S. 66, and with decisions in other circuits interpreting and applying those cases.

In *The Syracuse*, where a tow libeled a towing vessel for damage sustained when brought into collision with a third vessel it was held, in spite of a contract provision reciting that the towage was at the risk of the towed vessel, that where the damage was the result of the negligence of the towing vessel, that vessel "must be visited with the consequences."[10] In *The Wash Gray*, an insurer defended suit by the owner of a towed vessel on the ground that under the provisions of its policy the insurer was discharged by reason of a release to the towing vessel and assumption of risk by the towed vessel contained in the towage contract. This court rejected the defense, holding that the provisions of the contract did not release the tug from liability for the negligence of its master and crew, and stating that "the rule laid down by this Court in *The Syracuse* covers the point."[11]

The latter decision was regarded[12] as resolving a conflict between the Second and Ninth Circuits on the question of the right of owners of towing vessels to contract against their own negligence,[13] in favor of the Ninth Circuit which had denied the right. But the subsequent decision of this court in *Sun Oil Co. v. Dalzell Towing Company*, seems to have resulted in further divergence of opinion among the circuits. In that case a tanker sued tugboat owners for

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[10] 79 U. S. 167, 171.

[11] 277 U. S. 66, 73.

[12] Robinson on Admiralty, pages 670-672.

[13] *Mylroie v. British Columbia Mills Tug & Barge Co.*, (9th CA), 268 F. 449 (1920). Aff'd on other grounds, 259 U. S. 1; *The Occanica*, (2nd CA), 170 F. 893 (1909), cert. den. 215 U. S. 599.

damages incurred when the tanker went aground while being assisted by tugs. The tug owners defended on the basis of the following clause in the towing agreement:

> "When the captain of any tug engaged in the services of towing a vessel which is making use of her own propelling power goes on board said vessel, it is understood and agreed that said tugboat captain becomes the servant of the owners in respect to the giving of orders to any of the tugs engaged in the towage service and in respect to the handling of such vessel, and neither the tugs nor their owners or agents shall be liable for any damage resulting therefrom."

This court sustained the defense, observing that the tanker's master, officers and crew were at their stations and her propelling power and steering apparatus were in use, and said "It was not shown that respondent was to have or at any time did have control of the tanker or that it agreed or undertook to do more than to furnish tugs to assist her while using her own propelling power."[14] Noting that the services covered by the contract were "less than towage",[15] the court stated that the provision was nothing more than an expression of the well-established rule that "when one puts his employee at the disposal and under the direction of another for the performance of service for the latter, such employee while so engaged acts directly for and is to be deemed the employee of the latter and not of the former. . . ."[16]

Although this court was at pains to avoid any such inference, and the intention not to overrule *The Syracuse* and *The Wash Gray* seems clearly expressed, the Fifth Circuit, (as well as the Fourth), apparently interprets *Sun Oil Company v. Dalzell Towing Company* as requiring

[14] 287 U. S. 291, 293.
[15] 287 U. S. 291, 294.
[16] 287 U. S. 291, 295.

that provisions of towing contracts be given conclusive effect in every circumstance, having held in litigation between tug and tow that release and pilotage clauses were effective to relieve the tower of liability for negligent towage of a dumb barge.[17]

On the other hand, since the *Sun Oil Company* decision, the Ninth Circuit in *Hall Scott Motor Car Co. v. Universal Insurance Company*, (1941) 122 F. 2d 531, seems still to adhere to its decision in *Mylroie v. British Columbia Mills Tug and Barge Co.*, and the Sixth Circuit, in *Great Lakes Towing Company v. American SS Company* (1948) 165 F. 2d 368,[18] took the view that this court by affirming the Ninth Circuit's decision in *Mylroie v. British Columbia Mills Tug & Barge Co.*, "in effect, if not in phrasing" applied the principle of *The Syracuse*, saying that if compelled to decide the case upon the validity of the towage contract, "it might seem to us that decision must be controlled by the doctrine of *The Syracuse.*"[19] The District Court for the District of Delaware recently has concluded that past differences of opinion as to the effect of attempts to insulate against liability in towage situations "were settled in *The Wash Gray*";[20] and in the Southern District of New York, in *Petterson Lighterage Company v. Tug J. R. Russell*, (1949) 87 F. Supp. 467, it was held that, except in the "special case" which arises in the limited situation presented in the *Sun Oil Company* case, *The Wash Gray* still requires "a general release or exemption running to the tower" to be held void,[21] a conclusion supported by the

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[17] *Bisso, Jr., Receiver, et al. v. Inland Waterways Corp.*, see footnote 1, supra.

[18] Cited by the Fourth Circuit in the case at bar as upholding "the validity of an analagous provision".

[19] 165 Fed. 2d 368, 371.

[20] *Texas Company v. Lea River Lines, Inc.*, 109 F. Supp. 266, 267; reversed on other grounds, (3rd CA), 206 F. 2d 55.

[21] 87 F. Supp. 467, 470.

opinion of Professor Robinson. *Robinson on Admiralty*, 1939, pp. 670-673. Thus, on the question of validity of release and pilotage clauses there is conflict between the Fourth and Fifth Circuits on the one hand, and the Sixth and Ninth Circuits and the Southern District of New York and the District of Delaware on the other.

In addition, the Fourth Circuit's decision is in conflict with decisions of the Third Circuit and the Court of Appeals of New York, which without specifically invalidating the pilotage clause, denied it effect in fixing liabilities of tug and tow to third parties.

In *Publicker Industries, Inc. v. Tugboat Neptune Company and Tugboat Triton Company* (WILLAM J. WORTH) (3rd CA) 171 F. 2d 48, (1949) both tug and tow were sued by owners of a dock damaged by the steamer through negligence of a tugmaster directing undocking operations from aboard the steamer. The court of appeals (having in earlier proceedings[22] vacated a decree entered by the District Court of the Eastern District of Pennsylvania against the vessel owner) affirmed the district court's decree imposing sole liability on the tugs. As to the tug owners' contention that the standard form of pilotage clause[23] absolved them from liability, the Third Circuit said that "even if we assume that the tugboat companies were entitled to the benefit of the pilotage clause" as between themselves and the owners of the steamer, inasmuch as the plaintiff was not a party to the contract, the clause

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[22] 165 F. 2d 1002.

[23] "Whenever the Master or other officer of any tug or any licensed pilot goes on board a vessel to assist her movement or handling, he becomes and continues to be solely the servant of said vessel and her owners in respect of all acts done by him and all orders given by him to any tugs engaged or to said vessel or otherwise in the movement or handling of said vessel; and none of the tugs or their owners, agents or charterers shall be responsible or liable for any claims or any damages caused by or resulting form such acts or orders."

"was not conclusive" in determining whether the captain of the tug was in control of the operation or was acting under the orders of the captain of the steamer. Thus, the court said, "while it was proper for the (district) court to consider the clause in determining (this) actual fact," it was "not error for the court from the other evidence in the case to find the actual fact to be that (the tug captain) acted throughout as employee and agent of the tugboat company."[24]

In *Patterson Oil, Inc. v. Tug Port Covington*, (DCED Pa.) 109 F. Supp. 953, (1953) wherein libelant's mooring dolphin was damaged as a result of the negligence of both tug and tow, and both were sued, the District Court for the Eastern District of Pennsylvania declined to consider the effect of the pilotage clause which the tug owner contended made the vessel owner solely liable. The district court said "the pilotage clause by which the docking pilot became the servant of the vessel and her owners does not affect the tort liabilities of the parties to the libelant, whatever its effect may be as between the two parties to the contract."[25] The court of appeals, affirming, said ". . . the district court refused and properly so, to adjudicate with reference to questions related to the operation of the pilotage clause."[26]

Robins Drydock & Repair Co. v. Navigazione Libera Triestine, S.A. and Moran Towing & Transportation Company, Inc. (BRENTA II) 154 N. Y. Misc. 788, aff'd. 261 N. Y. 455, cert. den. 290 U. S. 656, was another case of damage to a dock in which the dock owner sued both tug and tow. Negligence of the tugmaster who was aboard the steamer

[24] 171 F. 2d 48, 50, 51.
[25] 109 F. Supp. 953, 955.
[26] *Patterson Oil, Inc. v. Tug Port Covington*, (3rd CA), 205 F. 2d 691, 693.

was established and tug owners contended that the ship was solely responsible to the dock owner because under the pilotage clause the tugmaster became the servant of the ship. The trial court said that the liabilities of tug and tow as to persons not parties to the contract "must be measured by the actual relation of" each of them to the individual causing the damage, and the relationship "must be determined by all the facts surrounding (his) employment. It is by no means conclusively established by what the parties in the pilotage clause declared those relations to be . . . the language of the parties could not have been made strong enough to change the essential character of the relation by any change of name." Applying this test, the trial court found that "Control and direction and the choice of methods rested exclusively with (the Tugmaster) as the representative of the towing company",[27] and held the tug solely responsible, exonerating the steamer. In affirming, the Court of Appeals of New York, citing *Sturgis v. Boyer*, pointed out that in performing the maneuver involved, the general rule is that the tower acts as an independent contractor and is primarily liable for negligent injuries; and that except for the so called "pilotage clause" the general rule would apply. But the court said ". . . as such, it has no validity as to third persons . . . something more, however, is claimed for it. Because it says that the 'tugboat captain becomes the servant of the owners . . . in respect to the handling of such vessel,' it is argued that such was in fact (his) relation to the ship's owner, even when considered in the light of the surrounding facts and circumstances. We do not understand appellant to argue that in and of itself the clause was conclusive on plaintiff. That, of course, would not be so. . . . The question became one of fact and was so determined below; nor did the Court in

[27] 154 N. Y. Misc. 788, 794, 795.

considering the question, lose sight of the contract itself, as appellant asserts. The description which the parties gave to their own relation was weighed against the facts, and the facts were found not to justify that description."[28]

William J. Worth and *Brenta II* were deemed not applicable in the present case, because the Fourth Circuit said it was not called upon to decide whether the owner of a tug may ever escape liability to a third party by reason of the contract, but only whether liability of the owner of the tow to third parties may be based on such an agreement.[29] In both of those cases, however, in the face of a contention that the towing contract made it solely responsible, the towed vessel was completely exonerated on the grounds that in determining liabilities of towed vessels to third parties the contract was either ineffective or insufficient as evidence of the actual relationship between the owner of the tow and the tugmaster to overcome other proof. Because petitioners themselves committed no tortious act as to the WINDING GULF, the underlying question here, to the same extent as in the *William J. Worth* and *Brenta II*, was one of agency of the tugmaster, and the application of the reasoning of the Third Circuit and of the New York Court of Appeals to the facts of this case must necessarily have produced a different result.[30] By the same token, the reasoning of the Fourth Circuit would seem rather plainly to have required exoneration of the towing company, had it been in the case, contrary to the result reached in the *William J. Worth* and *Brenta II*, and in spite

[28] 261 N. Y. 455, 462, 463.

[29] Record, page 47.

[30] It was never contended in this case that there was any fact (except the language of the towing contract alone) which would remotely suggest that the tugmaster was not in reality acting as agent and servant of the towing company.

of the court's disclaimer that it was adjudicating the right of the tug to escape liability.

Finally, the decision of the court of appeals seeming to give effect to the contract as a contract of indemnity and to permit its direct enforcement against petitioner as indemnitor by the owners of the WINDING GULF, who were strangers to it,[31] is in direct conflict with decisions of this Court and the Third Circuit. In *Robins Drydock & Repair Co. v. Flint* (1927) 275 U.S. 303, this court refused to permit recovery by time charterers of a steamship against a drydock company for loss of use of the steamer delayed in drydock because damaged while there through the negligence of drydock employees, the libel having been brought upon the apparent theory that the contract for drydocking between the drydock company and the owners was made for the charterer's benefit and was incidental to the charter party. Justice Holmes said ". . . it is plain, as stated by the circuit court of appeals, that the libelants, respondents here, were not parties to that contract 'or in any respect beneficiaries', and were not entitled to sue for a breach of it 'even under the most liberal rules that permit third parties to sue on a contract made for their benefit.' 13 F. 2d 4. Before a stranger can avail himself of the exceptional privilege of suing for a breach of an agreement, to which he

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[31] This conclusion appears to have been arrived at upon the court's own initiative. No such argument was made to it, and no such claim is apparent from the pleadings. To the contrary, cross-libelants repeatedly disclaimed any intention to rely "on the contract qua contract". The question therefore was never discussed, either in the district court or on brief or in argument in the court of appeals. After the decision, petitioner suggested in petition for rehearing to the court of appeals that an opportunity be afforded to brief and argue the matter, but the court denied the petition without opinion. To the extent the order denying rehearing imported an opinion that the result would not be changed upon proof of inequality of bargaining power, the case is also in direct conflict with *Sun Oil Co. v. Dalzell Towing Co.*, 287 U. S. 291, 294.

is not a party, he must at least show that it was intended for his direct benefit.' *German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U.S. 220, 57 L. ed. 195, 199, 42 L.R.A. (N.S.) 1000, 33 Sup. Ct. Rep. 32 . . . the contract of the petitioner with the owners imposed no immediate obligation upon the petitioner to third parties as we already have said, and whether the petitioner performed it promptly or with negligent delay was the business of the owners and of nobody else."[32]

Since *Robins Drydock & Repair Co. v. Flint*, the theory of liability on the cross-libel adopted by the Fourth Circuit seems seldom, if ever, to have been invoked in admiralty. However, the Third Circuit, in *Isbrandtsen Company v. Local 1291 of International Longshoreman's Association* (1953) 204 F. 2d 495, denied the right of time charterers of a vessel to sue a longshoremen's union for damages caused by delay in unloading, due to a work stoppage contrary to the provisions of a contract between the union and a marine trade association, on the ground that the charterer (not a party to the contract) was neither a "donee" nor a "creditor" beneficiary but, at best, only an "incidental" beneficiary.[33] It was thought perhaps an arguable question whether the claim was based upon any federal authority or whether state law would apply by virtue of diversity of citizenship, but the court concluded that the question need not be resolved, because "We think that *Robins Drydock & Repair Company v. Flint* shows clearly that there could be no recovery under federal authority, and the same thing is true under Pennsylvania decisions."[34]

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[32] 275 U. S. 303, 307, 308.

[33] The court employed the classification of beneficiaries as used in Restatement of Contracts, §§133-147.

[34] 204 F. 2d 495, 499.

CONCLUSION

The validity and effect of release provisions and pilotage clauses in towing contracts generally is a matter of paramount importance to the shipping industry, because the use of such provisions has become widespread if not universal. In particular, the extension in the present case of the applicability of such provisions for the first time to impose direct liability on the owner of an inert tow to a stranger to the contract, if permitted to stand, will have far-reaching consequences touching and unsettling many aspects of the admiralty law. The case thus presents this court with an opportunity to define the effect of such provisions in a situation graphically illustrating the need for such definition.

The writ of certiorari prayed for should be granted and the decision of the Court of Appeals for the Fourth Circuit reversed.

Respectfully submitted,

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